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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1372

In the Matter of:

ALDON KEITH KENTNER,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY
and THE SEACOAST TRANSPORTATION COMPANY,

Respondents.

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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INTRODUCTION

The Petitioner, ALDON KEITH KENTNER, docketed his Petition for a Writ of Certiorari in this Court on March 11, 1974. The case of *Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974) first appeared in the West Publishing Company Federal Supplement advance sheet dated March 18, 1974, and was not available to petitioner when his petition was filed. Accordingly, pursuant to the provisions of Rule 24(4) and (5), Supreme Court Rules, petitioner files this supplemental brief to call the attention of this Court to the *Wiederhold* decision, and combines in this brief his Reply to respondents' brief served on April 6, 1974.

The following reference symbols will be used:

(R) Brief of Respondents in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Second District.

(PA) Appendix to Petition by Aldon Keith Kentner for a Writ of Certiorari to the District Court of Florida, Second District.

SUPPLEMENTAL ARGUMENT

Wiederhold is based upon facts remarkably similar to the facts of the present case, and decides the identical issues of law presented to this Court by petitioner. *Wiederhold* correctly holds that the doctrine of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 341 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), that a party releases only those he intends to release, applies with full force to actions brought under the Federal Employers' Liability Act [hereinafter "FELA"] and that a railroad may not set up as a defense to a FELA action a release given to a third-party where the railroad is not named in the release, is not a party to the settlement, and is not intended to be benefited by the release.

In *Wiederhold*, the plaintiff was an automobile driver and chauffeur for the defendant railroad. While plaintiff was driving an automobile on behalf of the railroad, a third-party improperly turned in front of the plaintiff, who was unable to stop and was injured in the resulting accident. Plaintiff sued the third-party tortfeasor for negligence, and sued the railroad under the FELA. Plaintiff also filed a state workmen's compensation claim against the railroad, but the claim was dismissed because the FELA remedy is exclusive.

Plaintiff, upon the advice of an attorney, settled his action against the third-party driver and signed a release in favor of said third-party. The railroad was not a party to the action against the third-party driver, was not a party to that

settlement, was not named in the release, and was not intended to be benefited by the release. As in the present case, the railroad in *Wiederhold* attempted to utilize the release given to the third-party as an absolute defense to the plaintiff's FELA claim against the railroad. The railroad moved to dismiss, and since extrinsic matters were presented and accepted by the court, the court treated the motion as one for summary judgment and denied it. In the present case, virtually the same procedure was followed by the Florida court, except that summary judgment was entered in favor of the Respondent Railroad, which thereby received the full benefit of a release given to a third-party.

The release given by *Wiederhold* to the third-party tortfeasor purported to release the third-party tortfeasor and "all other persons, firms or corporations liable or who might be claimed to be liable." (368 F. Supp. at 1060) In the present case, the release purported to release the third-party tortfeasor and "any other person, firm, or corporation charged or chargeable with responsibility or liability, . . ." (*See* PA-11). Comparison reveals the amazing similarity of the release language in the two cases.

In both the present case and in *Wiederhold*, the plaintiff executed the release in favor of the third-party on advice of counsel. Both cases thus illustrate the serious trap for FELA plaintiffs and their lawyers in situations in which settlement with a third-party tortfeasor is achieved and a release given prior to completion of the FELA action. The *Wiederhold* court correctly recognized that this pitfall can be avoided and uniformity achieved in FELA actions only by the application of the doctrine of *Zenith v. Hazeltine, supra*.

The court's reasoning in *Wiederhold* is noteworthy. Citing the decisions in *Panichella v. Pennsylvania r.r. co.*, 167 F. Supp. (W.D. Pa. 1958) *rev'd* 268 F.2d 72 (3d Cir. 1959) *cert. den.* 361 U.S. 932, 80 S.CT. 370, 4 L.Ed. 2d 353 (1960), and *Falco v. Pennsylvania R.R.*, 202 Misc. 769, 109 N.Y.S.2d 279

(1951), the court acknowledged that both of those FELA cases hold that a release of one joint tortfeasor released the railroad a well. Questioning the continued validity of those decisions, the court reasoned (368 F. Supp. at 1057):

> Although the *Falco* and *Panichella* decisions support the defendant's position, the continued vitality of these decisions is placed in doubt by recent decisions and attacks on the common law rule that release of one joint tortfeasor releases other joint tortfeasors.
>
> * * *
>
> Several reasons exist why federal law in this area should accommodate state law. In FELA actions federal law is applied in order to insure a uniform application in all states. It would be anomalous for the federal law on releases to conflict with the state laws. Since most states no longer adhere to the common law of releases, it could create confusion for the law of releases to be different depending on whether the action against the party released was based on state or federal law. Under such circumstances it would be possible to settle the FELA claim and still preserve an action against another joint tortfeasor if based on state law, but it would not be possible to settle the state law claim and still proceed with an FELA action.
>
> Another problem arises because many standard release forms will be printed to conform to state law. Both attorneys and parties may resort to such forms for FELA cases only to find that they have released tortfeasors they did not intend to release. Since the state rule would be less harsh than the federal rule on the effect of releases, a party may fall into a trap by signing a release which would not release all tortfeasors in actions based on state law, but would release all tortfeasors in causes of action founded on federal law. For these reasons the *Falco* and *Panichella* holdings should be re-examined.

The District Court then re-examined the *Falco* and *Panichella* holdings in light of this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 341, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), and concluded (368 F.Supp. at 1059):

Although the *Zenith Radio* case adopted the intent rule only for antitrust cases, the broad language of the court indicates that the common law rule is not applicable to statutory causes of action created under federal law such as FELA actions. It is also clear that compelling reasons exist for adopting a rule focusing on the intent of the parties in FELA actions. The statute by requiring the application of federal law strives for uniform results. Currently among the states various rules regarding releases are applied. To adopt a restrictive federal rule regarding releases, such as the common law rule, would mean that most releases which would preserve a right of action against other tortfeasors under state law would not preserve such rights if used in a FELA action. If the broader intent rule is applied, the many variations of release law among the states can be accommodated by the federal law, since in each case it is a factual question whether the plaintiff intended to release all or just some tortfeasors. Thus, if under state law a right to proceed against other tortfeasors is only preserved if expressly stated in the release, a party executing such a release in compliance with state law would not lose his right of action under the FELA, as his intent to preserve his action would clearly be shown. If state law focused on intent, then it also would be accommodated by federal law. Similarly, if a state provided that a covenant not to sue could be used in place of a release in order to safeguard the right to proceed against a joint tortfeasor, the use of such a covenant would be evidence of an intent not to release all tortfeasors under federal law. By applying the intent rule in federal actions, a party could properly preserve his right of action under state law and still be safeguarded under the federal law. The intent rule best minimizes potential conflicts in the federal system.

The court's reasoning is sound, logical and persuasive. Releases play a vital role in the administration of the FELA and in the achievement of its humanitarian and remedial purposes. The present case presents this Court with a unique opportunity to avoid confusion by resolving the question of whether courts deciding FELA cases are to be guided by the older reasoning enunciated in *Falco* and *Panichella*, *supra*, or are to adopt and apply the rationale of *Wiederhold* that the "intent" rule of *Zenith v. Hazeltine* applies with full force in all FELA actions.

REPLY ARGUMENT

INTRODUCTION

Pursuant to Rule 24(4), Supreme Court Rules, petitioner replies to the arguments first raised by respondents' brief in opposition to Petition for Certiorari.

ARGUMENT

1. *Respondents argue that there is no conflict with* Zenith Radio Corp. v. Hazeltine Research, Inc., *401 U.S. 321 (1971) because* Zenith *involved a "special" release and this case involves a "general" release.*

Since the decision in *Zenith v. Hazeltine, supra*, it is settled federal law that:

> [A] party releases only those other parties whom he intends to release. (401 U.S. at 347)

Zenith does not distinguish between so called "special" and "general" releases. In deciding *Zenith*, this Court relied upon and approved *Young v. State*, 455 P.2d 889 (Alaska 1969), which involved a "general" release and which is squarely against the Railroad. In *Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974), the United States District Court correctly applied the *Zenith* Rule to a "general" release, the language of which is almost identical to the present release. Respondents' brief completely fails to cope with these two decisions, other than to create a spurious distinction between "special" and "general" releases, and respondents attempt to brush these cases aside on the basis that *Young v. State* "involves only questions of Alaska State Law" and that *Wiederhold* "is erroneous in that it fails to distinguish between a general release and a special release." (R. 9 n. 1)

The respondents' brief dramatically illustrates the developing conflict among federal courts[1] and between federal courts and state courts[2]. The District Court's decision in *Wiederhold, supra*, is clearly right, but right or wrong, this Court should grant its Writ of Certiorari to resolve the growing body of conflict in this important area of law.

2. *Respondents question the jurisdiction of this Court because "the instant case does not involve construction of the FELA or its application but is concerned solely with federal case law . . . ."*

Respondents' half-hearted questioning of this Court's jurisdiction is fully refuted by *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), which involved the validity of a release in a FELA action. The *Dice* case was reviewed by this Court on a Writ of Certiorari to the Supreme Court of Ohio. This Court stated that Certiorari was granted "because the decision of the Supreme Court of Ohio appeared to deviate from previous decisions of this Court that federal law governs cases arising under the Federal Employers' Liability Act."

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1. *Compare Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Sup. 1054 (N.D. Ind. 1974) *with Panichella v. Pennsylvania R.R. Co.*, 268 F.2d 72 (3d Cir. 1959) *cert. den.* 361 U.S. 392, 80 S.Ct. 370, 4 L.Ed. 2d 353 (1960).

2. *Compare Kentner v. Seaboard Coastline R.R. Co.*, 278 So.2d 637 (2d D.C.A. Fla. 1973 *cert. den.* 285 So.2d 614 (Fla. 1973) *with Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974). The Florida Supreme Court's refusal to review this case was a 4-3 split decision.

In *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 426, 87 L.Ed. 239 (1942), the plaintiff brought an action in a Pennsylvania State Court for maintenance and cure and for damages under the Jones' Act. The issue was whether a release given by the plaintiff was obtained by fraud and misrepresentation. The Pennsylvania court ruled that the more stringent Pennsylvania burden of proof would apply and granted the defendant a judgment n.o.v. The Pennsylvania Supreme Court affirmed because the Pennsylvania rule as to burden of proof on releases did not affect the "substantive rights" of the parties, was merely "procedural" and was therefore governed by state law. This Court granted its Writ of Certiorari because "the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under §237(b) of the Judicial Code 28 USCA §344(b)." [Presently codified as 28 U.S.C. §1257].

In both *Dice* and *Garrett* this Court granted certiorari where state decisions conflicted not directly with the language of the federal statute, but with this Court's decisions setting forth policies to be followed under the federal statutory schemes involved. The release in the present case had a dramatic effect upon petitioner's substantive federal rights under the FELA. Respondents' jurisdictional aside (R. 8) is without foundation.

3. *Respondents argue that they properly invoked the Parol Evidence Rule because their rights "depend upon" the release.*

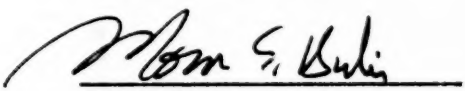
Respondents rely principally on certain decisions of inferior federal courts in *tax cases* decided prior to *Zenith* (R. 11). Respondents fail to cite a single federal case holding that the Parol Evidence Rule is applicable in favor of a stranger to a *release*. Tax cases obviously are not applicable because they involve the right of the United States to prevent a taxpayer from disputing his own written contract. The United States does not claim under those contracts.

The Railroad also relies upon a New Hampshire State Court decision, *Cornellier v. Hinsdale Raceway, Inc.*, 248 A.2d 91 (N.H. 1968). That case involved an automobile accident governed by the laws of the State of New Hampshire. The New Hampshire Supreme Court refused to permit the introduction of parol evidence where a release purported to release an individual and "any and all other persons, firms and corporations . . . ." Reliance upon *Cornellier* simply illustrates the patent conflicts between *Cornellier* and the present case on one hand, and *Zenith* and *Wiederhold*, *supra*, on the other. The railroad in *Wiederhold* contended that plaintiff could not offer proof to counter the express language of the release, but the District Court, correctly interpreting the principles enunicated in *Zenith*, denied the railroad's motion for summary judgment and indicated an intention to receive parol evidence on the issue of the intent of the release. Respondents' brief well illustrates the serious conflicts developing in both the federal and state systems on this point, and this case presents a perfect opportunity for resolution of the emerging conflicts in this very important area of federal law.

CONCLUSION

For the reasons originally set forth in the petition herein, as fully supported by the District Court's decision in *Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974), the Court should issue its Writ of Certiorari to review the opinion of the District Court of Appeal of Florida, Second District.

Respectfully submitted,



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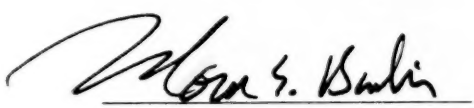
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Supplemental and Reply Brief in Support of Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District, have been sent by mail this 12 day of April, 1974, to William A. Gillen, Esquire, of Fowler, White, Gillen, Kinney, Boggs and Villareal, P.A., Post Office Box 1438, Tampa, Florida 33601, Attorneys for Respondents, Seaboard Coast Line Railroad Company and the Seacoast Transportation Company.



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